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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No.

JAMES MAURICE JACKSON, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether a defendant can waive or toll the application of the Interstate Agreement on Detainers Act, 18 U.S.C Appx. Arts. I-IX, when no hearing is conducted in open court to determine whether good cause exists to toll its application.

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The petitioner, James Maurice Jackson, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on September 9, 1983.

OPINION BELOW

The opinion of the Court of Appeals is reported at 717 F.2d 1481 (4th Cir. 1983) and the relevant part of that opinion appears in the Appendix hereto. No opinion

was rendered by the District Court for the Eastern District of North Carolina, Raleigh Division; however its Order of September 28, 1982 appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on September 9, 1983. A timely petition for a rehearing was denied on November 14, 1983, and this petition for certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

18 U.S.C Appx. Arts. I-V. These articles of the Interstate Agreement on Detainers Act are reproduced in full in the Appendix hereto. However, Article IV(c), the provision at issue in this case, reads as follows:

> In respect to any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open Court, the prisoner or his counsel being present, the Court having jurisdiction of the matter may grant any necessary or reasonable continuance.

STATEMENT OF THE CASE

On February 2, 1982, petitioner Jackson, along with five other persons, was indicted in the Eastern District of North Carolina for the offenses of conspriacy to possess with intent to distribute cocaine and use of a communication facility (telephone) in furtherance of that conspiracy. The United States brought Jackson to trial in North Carolina only after removing him from State custody in Florida, by filing a detainer on January 19, 1982, and, thus, causing a Writ of Habeas Corpus Ad Prosequendum to be executed on March 6, 1982. The 120-day time limitation of the Inter-

state Agreement on Detainer's Act (hereinafter IAD) began running on April 13, 1982, the date on which petitioner Jackson arrived in North Carolina.

Initially, the trial was set for May 24, 1982 with pre-trial hearings set to begin before the Magistrate on May 4, 1982. On May 7, 1982, the Clerk of the Court issued a memorandum to all counsel, advising of a continuance of the trial until June 21, 1982. No order was issued by the Court and no hearing addressing the IAD Act and its requirement for a "good cause" showing for a continuance was ever held in "open court."

On May 20, and 21, suppression hearings were held before the Magistrate. They were continued on June 10, 11, and 12, 1982 and were completed on June 21 through 22, 1982. At the close of the June 12, 1982 hearing, there was a discussion of the possibility of continuance of the trial between the Magistrate and counsel for Jackson because of the

failure of the Government to produce audible tapes of the wiretaps at issue. However, no motion for a continuance was granted; nor was the issue of the IAD time limitation discussed or considered in any way.

In an order dated June 16, 1982, a District Court Judge, who was not the trial judge, continued the case on the motion of co-defendants Provost, Brumgardner, and Hines. The IAD Act time limitation was not mentioned in the Order and no "open court" hearing on the issue of a continuance was held prior to the issuance of the June 16, 1980 Order. No motion for a continuance was filed by petitioner Jackson and, significantly Jackson was not included in the Order.

At the close of the final pre-trial hearing on June 22, 1982, there was more discussion between the various counsel, the Magistrate and the Clerk of the Court re-

garding a date for trial. No definite trial date was set although it appeared that scheduling conflicts of a number of counsel, including Jackson's, would prevent the scheduling of trial in the July 19, 1982 criminal session of the Court. The Magistrate suggested to the Clerk that she might set an August trial date. Again, there was no mention or discussion of the IAD Act and its time limitation. There was no "open court" hearing on whether good cause existed for a continuance under the IAD.

In a memorandum to all counsel dated July 22, 1982, the Clerk of the Court stated that the trial would be postponed until August 23, 1982, "in order to accomodate counsels' conflicts and to allow the Court time to complete other criminal matters." Once again, no "open court" hearing addressing the IAD limitation was ever held.

The trial in this case finally commenced on August 24, 1982, a full thirteen days beyond the 120-day limitation imposed by the IAD Act. Accordingly, on the first day of trial, counsel for Jackson made a motion to dismiss, with prejudice, the charges against Jackson. The motion was later denied, and petitioner Jackson was tried and convicted of the two offenses.

In denying petitioner Jackson's motion to dismiss because the 120-day limitation of the IAD Act had run, the District Court, in its Order dated September 30, 1982, held as follows: 1) that the forty-seven (47) day period taken up in disposing co-defendants' (including Jackson) Motion to Suppress was excludable from the 120-day limitation; (2) that petitioner Jackson's (alleged) Motion for a Continuance (which was not considered or granted) met the good cause requirement for delay set forth in the Act; (3) that "the time for con-

sideration of all motions made or joined by (Jackson) had the effect of providing the 'good cause' requirement for delay." (emphasis in original); and (4) that the Act does not mandate an automatic dismissal upon passage of the prescribed time period but rather permits the Court to "determine whether the delay is inconsistent with and frustrates the purposes of the Act."

A timely appeal was entered with the Fourth Circuit Court of Appeals, which, in its opinion dated September 9, 1983, affirmed the District Courts denial of petitioner Jackson's Motion to Dismiss. The Fourth Circuit Court of Appeals, did not decide the contested issue of whether petitioner Jackson had actually moved for a continuance but affirmed the trial Court Order on other grounds. Citing its decision in United States v. Odom, 674 F.2d 228 (4th Cir. 1982), cert. denied, 457 U.S. 1125 (1983), the Fourth Circuit Court concluded that "a de-

fendant waives the 120 day limitation by requesting to be treated in a manner inconsistent therewith". . . and that the "period excluded under the Speedy Trial Act, 18 U.S.C. § 3161(h)(1)(F) (e.g., period from filing to disposition of pretrial motions) likewise should be excluded under the IAD." 717 F.2d, 1486. Accordingly, the opinion directly below held that in joining co-defendants' Motion to Suppress the Wiretap Evidence, Jackson "must be deemed to have waived the 120-day limitation." Id. at 1487. The Fourth Circuit Court of Appeals also found that by seeking an additional ten days to submit memoranda (at the June 21 through 22, 1982 hearings) and by indicating that a July 19, 1982 trial date was unsatisfactory, Jackson's counsel was seeking a continuance that would toll the 120-day limitation. At no point did the District Court Order of September 28, 1982 or the Opinion below address the Act's requirement that a contin-

uance be granted only when good cause is shown in open court.

Petitioner Jackson, sought a rehearing en banc, arguing that an examination of the record indicated that petitioner Jackson's counsel disavowed any intention of obtaining a continuance and that at no point in any of the pre-trial proceedings was any hearing conducted on the issue of good cause for a continuance under the Interstate Agreement Act. The Court denied rehearing on November 14, 1983, with no opinion entered.

REASONS FOR GRANTING THE WRIT

This case raises a fundamental issue regarding the continued enforcement and effectiveness of the Interstate Agreement on Detainers Act (hereinafter IAD); namely, whether a defendant can waive or toll the application of the 120-day limitation when no hearing is conducted in open court to determine whether good cause exists to toll its application. In engaging in post hoc

determinations that defendant Jackson constructively waived his right to a trial within 120-days, both the trial court and the court below have ruled in a manner clearly inconsistent with the plain language and strict procedural requirements of the Act. The Act requires an open court showing of good cause as to whether the time limit should toll. No such hearing was held in the case at bar and this issue was not addressed by the trial court or the court below. Instead, the courts below have held that certain events and or conduct on the part of defense counsel can constitute a waiver or tolling of the 120-day limitation. Specifically, the opinion below held that by joining in pre-trial motions, requesting time to submit memoranda, and indicating his unavailability for trial on a certain date, defense counsel waived the right to a trial within the 120-day period.

Important questions are presented, therefore, with regard to the meaning, purpose and

application of the IAD Act. While these questions have not been definitely resolved, it is petitioner's view that the opinion below clearly conflicts with the requirements of the Act, and the intent of Congress. At stake is the future applicability of a Congressionally created procedural requirement and the right of an accused to be tried within the statutory period so as not to disrupt the rehabilitative process. The questions presented by this petition must be resolved by this Court in order to clarify the requirements of the Act, to ensure that the Congressional purpose is effected and to give notice to future defendants as to what actions will or will not preserve their rights under the Act. Finally, the statutory question at issue here is one that will recur frequently and will involve litigation around the issue of waiver until it is finally resolved by this Court.

ARGUMENT

The Interstate Agreement on Detainers Act (IAD) establishes a very strict and specific time limitation for trial of prisoners taken from confinement in other jurisdictions. The IAD explicitly provides that, if trial is not held within 120 days of the date the prisoner arrives in a receiving State, the charges are to be dismissed with prejudice. 18 U.S.C. Appx. Art. IV(c) and V(c). Unlike the Speedy Trial Act, 18 U.S.C. §3161, et seq., the IAD contains no list of automatic tolling provisions; rather it contains a unique, detailed procedure which must be followed if the trial is to be continued beyond the time specificed in the Act. The Act states, in relevant part as follows:

> [B]ut for good cause shown in open Court, the prisoner or his counsel being present, the Court having jurisdiction of the matter may grant any necessary or reasonable continuance.

18 U.S.C. Appx. Art. IV (c).

The issue in this case is whether the statutory provisions are to be applied as they read or whether the 120-day limitation can be waived by some other means. Clearly, the judicial interpretation of the Act, as announced in the opinion below, conflicts with the express language of the Act. The statute makes no allowance for an implied waiver or constructive tolling of the time limitation. The argument for the petitioner, then, follows the straightforward language of the Act and can be stated quite succinctly: a defendant must be tried within the 120-day period unless a showing of good cause for a continuance is made in open court.

In the instant case, petitioner's trial was continued on a number of occasions and for various reasons. The Government and the petitioner are in disagreement regarding the role of petitioner's counsel in delaying the trial date. It cannot be disputed, however, that no hearing was ever

held which specifically addressed the IAD Act and whether good cause existed for a continuance under the IAD. Indeed, this fact is implicit in the lower Court's ruling that petitioner waived the application of the IAD and/or that the IAD limitation was otherwise tolled.

In affirming Jackson's conviction, both the trial court and the court below failed to undertake a meaningful analysis of the Act and, instead, engaged in post hoc rationalizations for the Government's delay in not bringing defendant to trial within 120 days. The obvious flaw in the reasoning is that the Act does not permit the Courts to engage in after-the-fact surmizing of good cause(s) for delay. It requires, clearly and explicity, that any good cause be shown in open court prior to the granting of a continuance, so that a defendant is given the opportunity to assert his rights under the Act and to rebut any reasons for the delay. United

States v. Odom, 674 F.2d. 228 (4th Cir. 1982), cert. denied, 457 U.S. 1225 (1983). The Act recognizes that a hearing in open court, accompanied by argument and a finding of good cause, is the only practicable and fair means by which the time limit can be tolled.

In affirming the trial Court's denial of petitioner Jackson's Motion to Dismiss, the Court below ignored the explicit requirements of the Act and focused instead on the issue of waiver. In so doing, it relied almost exclusively on its decision in United States v. Odom, supra, when it held that "a defendant waives the 120-day limitation by requesting to be treated in a manner inconsistent therewith... and that "periods excluded under the Speedy Trial Act... (e.g. periods from filing to disposition of pretrial motion) likewise should be excluded under the IAD." United States v. Hines, 717 F.2d 1481, 1486, (4th Cir. 1983).

In Odom, the request to be treated in a manner inconsistent with the IAD occured

when Odom's trial counsel, in chambers, affirmatively asked for and consented to a continuance and when he entered into plea negotiations prior to trial. According to the court, this affirmative request to be treated in a manner contrary to the procedures of the IAD was sufficient to constitute a waiver.

The facts of the case at bar present questions that were not present in Odom and demonstrate conclusively that the "waiver analysis" creates more problems than it solves. Unlike the defendant Odom, petitioner Jackson never requested or consented in open court to a continuance. One might well ask whether actions such as requests for time to submit memoranda, joining in pretrial motions, and indicating difficulties with certain trial dates, rise to the level of affirmative requests to be treated in a manner inconsistent with the Act. It is this "second guessing" as to what constitutes a waiver or what actions

are inconsistent with the Act that the Act itself was designed to prevent. This kind of post hoc judicial analysis invites litigation and presents the danger of the exception swallowing the rule. The wisdom of the Act is that it provides a "bright line" standard and seeks to resolve these problems in a structured fashion in open court prior to trial.

Another major problem with the waiver exception is that it forces a defendant to preserve certain rights (e.g. discovery, trial preparation) at the cost of the right to a trial within 120 days. If the defendant is required to waive this right, he should be given notice prior to trial so that he can plan his defense accordingly. He should also be given the opportunity to rebut any assertion that good cause exists for a delay of the 120-day period. Stated simply, the defendant needs to know that he risks waiving the right before that right is actually lost. Again, the Act provides a resolution to this problem through the good cause, in open court

requirement. One's IAD rights cannot be lost or waived unless and until the continuance issue is raised and argued in open court and a finding of good cause is made.

The rule in Odom that behavior inconsistent with the Act constitutes a waiver is fatally flawed; It is unworkable, invites litigation, it hinders preparation for trial and it is contrary to the express language of the Act. Therefore, Odom must either be strictly limited to its facts or overruled. Insofar as the decision below relies on this holding of Odom, it should be reversed.

The court below also relied on a second holding of Odom that periods excluded under the Speedy Trial Act, 18 U.S.C. § 3161 (h)(1)(F) (e.g. period from filing to disposition of pretrial motion) likewise should be excluded under the IAD. There is nothing in the IAD providing a basis for such an interpretation, and a simple comparison of the language and purposes of the respective

statutes demonstrates the court erroneously read into the IAD an automatic waiver provision that isn't present.

Section 3161(h) of the Speedy Trial Act provides for specific periods of delay which are to be excluded in computing the time within which a trial must commence. No such provisions are contained in the IAD Act. If Congress had intended to exclude certain periods from the IAD time computation it would have inserted similar language in the Act. See United States v. Rutherford, 442 U.S. 544 (1979), Anderson v. Wilson, 289 U.S. 20 (1933).

The Odom court also concluded the two Acts "deal with the same subject matter" and have the "same purpose" Odom at 231. Herein lies the major flaw in the court's construction of the IAD Act. Unlike the Speedy Trial Act, which deals with the right to be tried quickly, the IAD creates a separate and independent right to be tried within a

period so as not to disrupt the rehabilitative process or subject the prisoner to too many burdens prior to trial. Given the fact that the IAD involves this separate purpose and contains no provisions for excludable time periods, it is inappropriate to read into it the automatic waiver provisions of the Speedy Trial Act. Thus, a pre-trial motion tolls the computation of the Speedy Trial Act but does not, in the absence of an open court hearing on point, toll the computation of the IAD time limitation.

In the pre-trial period below, the burden was clearly on the Government to raise the issue and to have it addressed by the defendant and the Court. As this Court made clear in United States v. Mauro, 436 U.S. 340 (1978) there was no obligation for a defendant to raise explicitly a detainer Act violation. In Mauro, this Court held:

> We agree with the Court of

> Appeals in No. 77-52, that Respondent Ford's failure to invoke the Agreement in specific terms in his speedy trial motion before the District Court did not result in a waiver of his claim that the Government violated Article IV(c)." Id. at 364.

The decision of the court below that certain actions constitute a waiver or tolling of the IAD time limitation is clearly at odds with the purpose, and express provisions of the IAD Act. In so construing the Act, the decision all but destroys the open court, good cause showing requirement as well as the purpose of the Act. In the case at bar, the Government could have attempted to toll the limitation of the IAD Act by raising the issue in open court prior to any continuance and by requesting good cause be found. Because of its failure to do so, the court below engaged in a complicated and unauthorized waiver analysis that has no foundation in law. The defendant cannot be penalized for asserting his rights

under the Act and cannot be deprived, post facto and without a hearing, of his opportunity to rebut the claim that the time limitation of the Act was waived or tolled.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES of America, Appellee,

v.

Ronald Doyle HINES, Appellant.

UNITED STATES of America, Appellee,

v.

Gary J. PEED, Appellant.

UNITED STATES of America, Appellee,

v.

Teresa ELEAZAR, Appellant.

UNITED STATES of America, Appellee,

v.

James Maurice JACKSON, Appellant.

UNITED STATES of America, Appellee,

v.

James C. CODDINGTON, Appellant.

UNITED STATES of America, Appellee,

v.

Jeffrey Craig BUMGARDNER, Appellant.

Nos. 82-5274(L), 82-5275 to 82-5278 and 82-5286.

United States Court of Appeals,

Fourth Circuit.

Argued July 14, 1983

Decided Sept. 9, 1983.

II.

The Interstate Agreement on Detainers Act ("IAD") provides that if trial is not held within 120 days of the date a prisoner arrives in a receiving state, the charges are to be dismissed with prejudice. 18 U.S.C. Appx. Arts. IV(c), V(c). The running of the 120-day limitation, however, may be tolled by the district court "for good cause shown in open court, the prisoner or his counsel being present." Id.

The government brought Bubba Jackson to North Carolina for trial from Florida, where he was in custody, by detainer. The 120-day limitation began running on April 13, 1982, the date Jackson arrived in North Carolina. See United States v. Bryant, 612 F.2d 806, 810-11 n. 7(4th Cir.), cert. denied, 446 U.S. 920, 100 S.Ct. 1855, 64 L.Ed.2d 274 (1980). The trial commenced on August 24, 1982, 133 days later. The parties dispute whether the running of the 120-day limitation period was tolled for at least 13 days.

In United States v. Odom, 674 F.2d 228, 230 (4th Cir.), cert. denied, 457 U.S. 1125, 102 S.Ct. 2946, 73 L.Ed.2d 1341 (1983), this court held that a defendant waives the 120-day limitation by requesting to be treated in a manner inconsistent therewith. The Odom court also held that the periods excluded

under the Speedy Trial Act, see 18 U.S.C. § 3161(h)(1)(F) (e.g., period from filing to disposition of pretrial motion) likewise should be excluded under the IAD. Thus, the government seeks to exclude all days from the filing of pretrial motions to the prompt disposition of those motions, since on April 26 Jackson moved the court to allow him to adopt the motions of his co-defendants. Hearing alone on these pretrial motions took 16 days (May 20-31, June 11-12, June 21-22). Indeed, in rejecting Jackson's motion for dismissal under the IAD, the district court found that Jackson's joining in the motion to suppress the wiretap evidence, without more, amounted to a waiver of the 120-day limitation.

Of critical importance in the instant situation are defendant Jackson's motion to suppress evidence seized as a result of various electronic surveillances.

Had the motion to suppress been allowed, it is doubtful that the government could have proceeded to trial since its case was based almost entirely upon this evidence. At least forty-seven days were required by the Magistrate to consider fully and make a recommendation concerning these motions to suppress. Since the trial commenced thirteen days after the running of the 120-day limitation, the 47-day delay caused by defendant Jackson's motions to suppress provides sufficient justification for the denial of defendant Jackson's motion to dismiss based upon the Interstate Agreement on Detainers.

The government also lists several continuances (i.e., requests to be treated inconsistently with the IAD) granted at Jackson's request: (1) at the request of Jackson's attorney, a pretrial hearing was delayed three days from June 7 to June 10; (2) the June 10-12 hearings were

continued nine days until June 21 at the request of all attorneys, including Jackson's; (3) at Jackson's attorney's request, defense counsel were given ten days, from June 22 until July 2 to file additional memoranda; and (4) Jackson's attorney, as well as other defense counsel, indicated that the clerk's suggested trial date of July 29 was not satisfactory, and the trial eventually was set for August 16.

Jackson attacks the government's assertion that he sought continuances. He cannot, however, rebut the government's claim that he sought an additional ten days to file memoranda or that he indicated that a July 19 trial date was unsatisfactory. Furthermore, even without considering the continuances, Jackson must be deemed to have waived the 120 day limitation by joining in the co-defendants' motions, especially the motion to suppress the wiretap evidence.

It is not surprising that Jackson was held beyond 120 days given defense counsel's extensive pretrial motions. Jackson joined in those motions, which took a substantial amount of time to resolve, and then surprised the district court by moving for a dismissal under the IAD on the first day of trial. Jackson sought to benefit from the pretrial motions which necessarily resulted in delays, and cannot now claim that he is aggrieved under the IAD by those delays.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 82-8-CR-5

UNITED STATES OF AMERICA

v. ORDER

JEFFREY CRAIG BUMGARDNER,
et al.

Defendants were charged in a multiple count indictment with intentionally combining and conspiring to violate the laws regulating a Schedule II controlled substance and with using a telephone to facilitate a conspiracy to violate the drug laws. See 21 U.S.C. §§ 846 & 843(b) 1976. On 24 August 1982, as jury selection began in the trial, defendant Jackson moved for a dismissal alleging a violation of the Interstate Agreement on Detainers. 18 U.S.C. App. § 2. Ruling was deferred on this motion allowing further time for careful consideration of this question. The issue is now ready for ruling.

The United States Marshal Service filed a detainer against defendant Jackson with the Sheriff of Duval County, Florida, on 19 January 1982. He was taken into custody by the United States Marshal, who began transporting him to North Carolina, where he arrived on 13 April 1982. His arrival in this state triggered the running of the 120-day time limitation which lies at the heart of this motion. United States v. Bryant, 612 F.2d 806, 810-11 n.7 (4th Cir. 1979), cert. denied, 446 U.S. 920 (1980). The Interstate Agreement on Detainers directs that "trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state. . ." 18 U.S.C. App. § 2 (Art. IV(c)). The trial in this action commenced on 24 August 1982, thirteen days beyond the 120-day limit imposed by Article IV(c), placing the time

limitation imposed by the Interstate Agreement on Detainers directly in issue.

The gist of the matter before the Court concerns the appropriate application of the 120-day limitation. Specifically, the Court must determine how rigidly to apply this provision. Such a determination necessitates inquiry into several areas. First, the procedural posture of this case must be examined with a critical eye toward the pre-trial motions filed by defendants. Second, the Court must analyze Article IV of the Interstate Agreement on Detainers, both from the standpoint of the legislative purpose behind the Act and prior interpretations thereof by other courts. Finally, the interplay between the procedural aspects of this case and the legal ramifications of the Act must be considered in light of the interest of justice.

From the outset, this case has been wrought with various pre-trial motions, among them being two intricate motions to suppress evidence seized as a result of electronic surveillance, various motions to dismiss, and motions for severance. The United States Magistrate conducted lengthy hearings on many of these motion and filed various memoranda and recommendations. In addition to the time required for the Magistrate to conduct the hearings, consider the evidence, contentions and law, and make his recommendations, this Court required additional time to review the matters in light of the numerous objections filed by all defendants. Defendant Jackson shares some responsibility for these time requirements since he filed a motion to join all co-defendants' motions on 26 April 1982.

Another important procedural consideration were the motions to continue filed by defendants Hines, Provost, Peed and Bumgardner which were allowed by order of Chief Judge Franklin T. Dupree of this Court. Judge Dupree specifically found that the time between the date of the continuance and the date upon which the trial commenced was excludable under the Speedy Trial Act. See 18 U.S.C. § 3161 (h)(8)(A)(1976). The Court considers it extremely important that defendant Jackson not only joined in the various motions to continue by virture of his motion to join in all co-defendants' motions, but also by his oral motion for a continuance of the trial. With the defendant present, his attorney moved for continuance in open court on 12 June 1982 before the United States Magistrate "on behalf of defendant Jackson." Tr. of Hearing on Motion to Suppress, at 506.

The Interstate Agreement on Detainers signifies a congressional purpose aimed at preventing unusual delays which could result from a prisoner being taken from custody in one state and held in another state while awaiting trial. This interruption of incarceration impedes the process of rehabilitation. Accordingly, the Act was designed to encourage the expeditious disposition of charges against transferred prisoners and to provide cooperative procedures to facilitate such disposition. United States v. Mauro, 436 U.S. 340, 351 (1978). Upon his transfer to a receiving state, the prisoner "must be brought to trial on the charges underlying the detainer within 230 days of his arrival. Again, if the prisoner is not brought to trial within the time period, the charges will be dismissed with prejudice, absent good cause shown." Cuyler v. Adams, 449 U.S. 433, 444 (1981) (dictum). Although

the Supreme Court noted the mandatory nature of the provisions of Article IV in Cuyler, the consideration was merely a dictum statement since that case dealt soley with the issue of whether a prisoner was entitled to a pre-transfer hearing under the Interstate Agreement on Detainers. Id. at 544. The Act does provide that the 120-day limitation may be extended "for good cause shown in open court, the prisoner or his counsel being present. . . ." 18 U.S.C. App. § 2. When considering the direct application of this limitation, the Supreme Court paid particular attention to the fact that the defendant had

> persistently requested that he be given a speedy trial. After his trial date had been continued for the third time, he sought the dismissal of his indictment on the ground that the delay in bringing him to trial while the detainer remained lodged against him was causing him to be denied certain privileges at the

> state prison. We deemed these actions on (defendant's) part sufficient to put the Government and the District Court on notice of the substance of his claim.

Mauro, 436 U.S. at 364-65. The implication of this analysis suggests that a defendant may not stand mute in the face of continuances and then seek a dismissal when the 120-day limitation expires. Rather, he should exert efforts directly to encourage an expedient process. In the instant case, defendant Jackson first claimed a violation of the Act on 24 August 1982 when the trial commenced. Not only did he fail to object to the various motions for continuances by his co-defendants, but he also moved for a continuance himself in open court. These actions run directly counter to the judicially imposed notice requirement for Article IV(c).

In addition to the motions for continuance, various other pre-trial motions caused the delay in the commencement of

the trial. Specifically, various motions to sever the trials, to dismiss the charges, and to suppress evidence required lengthy hearings before a Magistrate and additional time for the District Court to review and rule on the recommendations pertaining thereto. This delay, directly attributable to defendants' motion practice to which defendant Jackson had notice and made no objection to the delay it would engender, and in which he both joined and caused, is excludable from the 120-day limitation. Foran v. Metz, 463 F.Supp. 1088, 1097 (S.D.N.Y.), aff'd, 603 F.2d 212 (2d Cir. 1979). The time limitation does not require a rigid and inflexible schedule, but stands "to prohibit ex parte and sua sponte continuances." United States v. Ford, 550 F.2d 732, 743 N.30 (2d Cir. 1977), aff'd, 436 U.S. 340 (1978). This protection afforded transferred prisoners is not violated by allowing extensions of the 120-day limitation when the

prisoner's own motions and actions create the need for this additional time. "Where a criminal defendant seeks an adjudication on an issue that would preclude a trial, he cannot thereafter argue that the time required to decide his claim should be held against the state for purposes of computing limitations of time." Foran, 463 F.Supp. at 1097. Of critical importance in the instant situation are defendant Jackson's motions to suppress evidence seized as a result of various electronic surveillances. Had the motion to suppress been allowed, it is doubtful that the government could have proceeded to trial since its case was based almost entirely upon this evidence. At least forty-seven days were required by the Magistrate to consider fully and make a recommendation concerning these motions to suppress. Since the trial commenced thriteen days after the running

of the 120-day limitation, the 47-day delay caused by defendant Jackson's motions to suppress provides sufficient justification for the denial of defendant Jackson's motion to dismiss based upon the Interstae Agreement on Detainers. Id. at 1098.

Defendant makes a persuasive argument that the 120-day time limit is both mandatory and automatic. See Ford, 550 F.2d at 745 (Moore, J., dissenting). However, the Court feels that the 120-day limitation will not avail him here for the reasons set forth above and summarized below:

(1) The motion of defendant's attorney on 12 June 1982 for a continuance in open court with the defendant being present specifically meets the "good cause" requirement for delay set forth in the Act. 18 U.S.C. App. § 2.

(2) The time for consideration of all motions made or joined by defendant had the

effect of providing the "good cause" requirement for delay.

(3) This Court does not interpret the Act as mandating an automatic dismissal upon the passage of the prescribed time period. Rather, the Court must determine whether the delay is inconsistent with and frustrates the purposes of the Act.

In conclusion, the Court feels that defendant should not be allowed to use the passage of a time limitation, designed to protect his process of rehabilitation, as a sword when the defendant himself has caused, or substantially contributed to, the extension of that time limitation. Accordingly, the motion to dismiss is denied.

AND IT IS SO ORDERED.

This 30 September 1982.

/s/ W. Earl Britt
W. EARL BRITT
United States District Judge

APPENDIX C

INTERSTATE AGREEMENT ON DETAINERS

Act Dec. 9, 1970, P. L. 91-538, §§ 1-8, 84 Stat. 1397, provided:

Sec. 1. This Act may be cited as the Interstate Agreement on Detainers Act".

Sec. 2. The Interstate Agreement on Detainers is hereby enacted into law and entered into by the United States on its own behalf and on behalf of the District of Columbia with all jurisdiction legally joined in substantially the following form:

"The contracting States solemnly agree that:

"Article I

"The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of person already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and

the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

"Article II

"As used in this agreement:

"(a) 'State' shall mean a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

"(b) 'Sending State' shall mean a State in which a prisoner is incarcerated at the

time that he initiates a request for final disposition pursuant to article III hereof or at the time that a request for custody or availability is initiated pursuant to article IV hereof.

"(c) 'Receiving State' shall mean the State in which trial is to be had on an indictment, information, or complaint pursuant to article III or article IV hereof.

"Article III

"(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to

be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the imprisonment and his request for a final disposition to be made of the indictment, information, or complaint: Provided, That, for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decision of the State parole agency relating to the prisoner.

"(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections, or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

"(c) The warden, commissioner of corrections, or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based.

"(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for

final disposition of all untried indictments, informations, or complaints on the basis of which detainers have been lodged against the prisoner from the State to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections, or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the State to which the prisoner's request for final disposition is being sent of the proceeding being inititated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information, or complaint shall not be of any further force of effect, and the court

shall enter an order dismissing the same with prejudice.

"(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding comtemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving State to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending State. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph

shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

"(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

"Article IV

"(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: Provided, That the court having jurisdiction of such indictment, information, or complaint shall have duty approved, recorded, and trans-

mitted the request: And provided further, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

"(b) Upon request of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the State parole agency relating to the prisoner. Said authorities simultaneously shall furnish

all other officers and appropriate courts in the receiving State who has lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

"(c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

"(d) Nothing contained in this article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending

State has not affirmatively consented to or ordered such delivery.

"(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

"Article V

"(a) In response to a request made under article III or article IV hereof, the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information, or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made

by the prisoner, the offer of temporary custody shall accompany the written notice provided for in article III of this agreement. In the case of a Federal prisoner, the appropriate authority in the receiving State shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in Federal custody at the place of trial, whichever custodial arrangment may be approved by the custodian.

"(b) The officer or other representative of a State accepting an offer of temporary custody shall present the following upon demand:

"(1) Proper identification and evidence of his authority to act for the State into whose temporary custody this prisoner is to be given.

"(2) A duly certified copy of the indictment, information, or complaint on the basis of which the detainer has been

lodged and on the basis of which the request for temporary custody of the prisoner has been made.

"(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

"(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations,

or complaints which form the basis of the detainer or detainers of for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

"(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending State.

"(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the juris-

diction which imposed the sentence may allow. "(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending State and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

"(h) From the time that a party State receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending State, the State in which the one or more untried indictments, informations, or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for,

keeping, and returning the prisoner. The provisions of this paragraph shall govern unless the States concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies, and officers of and in the government of a party State, or between a party State and its subdivisions, as to the payment of costs, or responsibilities therefor.